Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 169

STEPHEN RADICH,

Appellant,

—v.—

PEOPLE OF THE STATE OF NEW YORK,

Appellee.

ON APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK

PETITION FOR REHEARING

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Stephen Radich, the petitioner herein, respectfully moves this Court for an order (1) vacating its affirmance of the decision below by an equally divided Court and (2) setting the instant case for reargument. As grounds for this motion, petitioner states the following:

I.

Petitioner suggests that it would be appropriate for the entire Court to participate in the consideration and decision of this case.

Petitioner's conviction for casting contempt upon the American flag was affirmed by an equally divided Court on March 24, 1971. Mr. Justice Douglas took no part in the consideration or decision of the case.

Petitioner is unaware of the basis for Mr. Justice Douglas' conclusion that his participation in the consideration or decision of this case would be inappropriate. However, it has been suggested that Mr. Justice Douglas' abstention might have stemmed from a reluctance to sit on cases involving those accused of flag desecration because he had publicly expressed personal disapproval of them. Petitioner respectfully suggests that such an expression of personal disapproval does not require his disqualification, and earnestly requests that this case be rescheduled for argument before the entire Court. Petitioner has no doubts whatever concerning the ability of any member of this Court to dissociate his personal beliefs from his view of the merits of a given constitutional issue. Petitioner has faith in Mr. Justice Douglas' ability to render dispassionate justice in this case.

Disposition of a criminal appeal raising serious constitutional questions by an equally divided Court is, we believe, an unsatisfactory method of dispensing justice. In such case it is not unprecedented for reargument to be granted by the entire Court including the Justice who initially did not participate. E.g. *Bartkus* v. *Illinois*, 355 U.S. 281 (1958), rehearing granted, 356 U.S. 969 (1958), conviction affirmed, 359 U.S. 121 (1959); *Ladner* v. *United States*, 355 U.S. 282 (1958), rehearing granted, 356 U.S. 969 (1958), conviction reversed, 358 U.S. 169 (1958).

In *Bartkus* and *Ladner*, Mr. Justice Brennan did not participate in the initial affirmance of the respective convictions by an equally divided Court, because he had been a member of the Court below in *Hoag* v. *New Jersey*, 356 U.S. 464 (1958), a companion case raising similar issues

of double jeopardy. Once *Hoag* was decided, however, Mr. Justice Brennan participated in the subsequent reargu-ments and opinions in *Bartkus* and *Ladner,* thereby permitting the Court to dispose of those cases by a majority vote.

We recognize that in the cases cited above there was an intervening circumstance which does not exist in this case. However, a re-evaluation by Mr. Justice Douglas of his refusal to participate can serve the same function, thereby enabling the Court on rehearing to pass on the constitutional issues.

II.

Petitioner suggests that an equally divided Court should not result in the affirmance of a criminal conviction raising substantial constitutional issues.

Petitioner recognizes that this Court has affirmed the judgment of the lower court in those rare instances when it is equally divided on the merits of an appeal. E.g. *The Antelope,* 10 Wheat 66, 126 (1825); *Etting* v. *United States Bank,* 11 Wheat 59 (1826); *Durant* v. *Essex Company,* 7 Wall (U.S.) 107 (1868); *Hertz* v. *Woodman,* 218 U.S. 205 (1910); *United States* v. *Pink,* 315 U.S. 203 (1942); *Raley* v. *Ohio,* 360 U.S. 423 (1950); *Ohio ex rel. Eaton* v. *Price,* 364 U.S. 263 (1960); *In re Spencer* 397 U.S. 817 (1970). Although the divided affirmance result evolved in the context of civil litigation, it has been applied to criminal cases. Petitioner respectfully suggests that given the philosophical and jurisprudential concepts of our criminal law (Cf. *In re Winship,* 397 U.S. 358 (1970)), this Court should reconsider the effect of the Court's inability to reach a ma-

jority in those few criminal cases raising constitutional issues of such substance and difficulty that the Court is equally divided on their merits.

This Court has ruled that before the State may impose criminal sanctions upon an individual, it must convince the finder of fact of his guilt beyond a reasonable doubt. E.g. *Brinegar* v. *United States,* 338 U.S. 160, 174 (1949); *Speiser* v. *Randall,* 357 U.S. 513, 525-526 (1958); *In re Winship,* 397 U.S. 358 (1970). The purposes of requiring a reasonable doubt rule in a criminal case were eloquently summarized by Mr. Justice Brennan in *In re Winship, supra,* when he wrote:

> "The requirement of proof beyond a reasonable doubt has this vital role in our criminal procedure for cogent reasons. The accused during a criminal prosecution has at stake interests of immense importance, both because of the possibility that he may lose his liberty upon conviction and because of the certainty that he would be stigmatized by the conviction. Accordingly, a society that values the good name and freedom of every individual should not condemn a man for commission of a crime when there is reasonable doubt about his guilt."
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> "Moreover . . . It is critical that the moral force of the criminal law not be diluted by a standard of proof which leaves people in doubt whether innocent men are being condemned." 397 U.S. at 363-4.

The underlying principle expressed in *Winship,* that the inertial benefit rest with the accused in criminal cases,

should be applicable to questions of law as well as issues of fact. Where the issues of law upon which guilt or innocence depend are so close that this Court is equally divided as to their proper resolution, we respectfully urge that fundamental fairness requires that the inertial benefit should rest with the accused and that the conviction should be reversed. Due regard for the "good name and freedom of every individual" and for the "moral force of the criminal law" demand that a criminal conviction which raises significant issues of constitutional law should be affirmed only when a majority of this Court concur.

CONCLUSION

For the reasons set forth above, petitioner prays that this Court grant rehearing of the order of affirmance of the Court of Appeals of the State of New York, vacate that order, and set the case for reargument.

Respectfully submitted,

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Certificate of Counsel

As counsel for the petitioner, I hereby certify that this petition for rehearing is presented in good faith and not for delay.

RICHARD G. GREEN